[Case Title] In re: James & Sharon Fuhrman, Debtor
[Case Number] 90-09567
[Bankruptcy Judge] Arthur J. Spector
[Adversary Number]XXXXXXXXXX
[Date Published] August 27, 1990

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

In re: JAMES F. FUHRMAN and SHARON L. FUHRMAN, Debtor. Case No. 90-09567 Chapter 12
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APPEARANCES:

JOSEPH MANSFIELD
Attorney for Debtors

D. KEITH BIRCHLER
Attorney for Farm Credit Bank of St. Paul

MEMORANDUM OPINION ON MOTION FOR DISMISSAL

Introduction

James and Sharon Fuhrman ("Debtors") first filed for relief under Chapter 12 of the Bankruptcy Code on November 12, 1987. The Debtors submitted two different plans of reorganization during the pendency of that case and each was denied confirmation. The case was dismissed on May 16, 1988 for failure to confirm a Chapter 12 plan. On June 20, 1989, the Debtors filed a second petition under Chapter 12 and once again presented two plans which were denied confirmation. The second proceeding was dismissed on May 21, 1990, pursuant to 11 U.S.C. §1208(c)(1) and (9). On June 26, 1990, the Debtors filed the present petition for relief. Farm Credit Bank of St. Paul ("FCB") responded to this third petition with a motion filed on July 11, 1990 seeking dismissal of the Debtors' case with prejudice pursuant to 11 U.S.C. §1208. A hearing on this motion was held on July 27, 1990, after which the parties submitted supplemental briefs. After due consideration of the evidence and the arguments, the Court concludes that dismissal is appropriate and will accordingly grant FCB's motion.

DISCUSSION

The Debtors' second petition was dismissed on May 21, 1990 pursuant to subsections (1) and (9) of 11 U.S.C. §1208(c), which provides:

> On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including--
>
> (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;
>
> . . .
>
> (9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation.

11 U.S.C. §1208(c). The Debtors are clearly precluded from relitigating the correctness of this Court's order dismissing their second petition; having failed to perfect an appeal from that determination, they are now bound by it. See 5 Moore's Federal Practice, ¶41.14 (2d ed. 1988); In re Damien, 35 B.R. 685, 687, 9 C.B.C.2d 1356 (Bankr. S.D. Fla. 1983). That determination, however, does not automatically warrant dismissal of the current petition; with exceptions not relevant here, the Code permits so-called "serial" filings. 11 U.S.C. §349(a). See generally 2 Collier on

Bankruptcy, ¶349.02 (15th ed. 1989). We must instead determine whether there has been a change in the Debtors' affairs since the dismissal of the second petition which warrants the conclusion that the Court's findings in May, which are conclusively presumed to have been correct when made, are no longer true today. See In re Johnson, 708 F.2d 865, 868 (2d Cir. 1983) (successive chapter 13 filings); In re Beswick, 98 B.R. 900, 904 (Bankr. N.D. Ill. 1989) (chapter 12); In re Hyman, 82 B.R. 23, 24 (Bankr. D. S.C. 1987) (chapter 12). Where, as in this case, the time frame between the prior dismissal and refiling is very short, the debtor must bear the burden of proof with respect to this issue. See In re McElveen, 78 B.R. 1005, 1007 (Bankr. D. S.C. 1987).

In their supplemental brief, the Debtors argue that three significant changes have occurred since dismissal of the last case. The first such alleged change is their recent determination that collateral securing a debt owed to the Farmers Home Administration ("FmHA") had been significantly undervalued. As a result of this determination, the Debtors claim that the amount of unsecured debt will be correspondingly reduced and the Debtors will therefore be better able to propose a plan that meets the best interest of creditors' test set forth in 11 U.S.C. §1225(a)(4).

The Debtors' redetermination of the FmHA's secured status resulted from a review of information that had been available to them during the pendency of their prior case, it was not the result of any post-dismissal events that caused an unanticipated appreciation in the value of the collateral. In essence, the "change" on which the Debtors rely represents nothing more than a change in legal reasoning and/or strategy, Just as inadequate legal representation is no basis for attacking the res judicata effect of a decision on the merits, a tactical change which could have been effectuated pre-dismissal does not constitute the kind of development that justifies refiling under chapter 12. Cf. Beswick, 98 B.R. at 904 (a change in legal counsel did not justify refiling under chapter 12, because "[a] party who chooses his counsel freely should be bound by his counsel's actions").

The Debtors also point to the fact that, since dismissal of the second case, they have decided to decrease their debt to FCB by deeding back a portion of farmland in which FCB holds a security interest. This "change" is essentially nothing more than a new term in a proposed plan of reorganization. If changes of this nature sufficed, Chapter 12 debtors would always be entitled to second (and third and fourth, etc.) bites at the apple; on refiling, the debtor would simply be required to propose a plan that was materially different from plans filed under prior proceedings. To so hold would be to state, in effect, that the sort of change which will entitle a debtor to yet another opportunity to propose a confirmable plan is to affirmatively demonstrate that a new plan will in fact be proposed. Neither case law nor simple logic support such a conclusion, and we decline to endorse it.

Finally, the Debtors cite the fact that they have recently retained a "professional agricultural consultant to advise them in the areas of beef cattle management and crop production." Page 2 of Debtors' Supplemental Brief. Once again, this is an action which could

easily have been taken prior to dismissal of the second case, and cannot now be cited as a grounds for justifying the current petition.

To sum up, the Debtors have not directed our attention to any material change in their circumstances. Such "changes" as they do allege are not the kind which justify a serial filing under Chapter 12. We therefore conclude that the factors which called for dismissal on May 21, 1990, namely, §1208(c)(1) and (9), likewise constitute grounds for dismissal of the current petition, and we will enter an order accordingly.

Dated: August ___, 1990. _____
ARTHUR J. SPECTOR
U.S. Bankruptcy Judge